Host Services, Inc. *and* Dorothy Perdon and Local 109, Waiters, Waitresses, Hotel, Motel, Service Employees, Cooks and Bartenders Union, Hotel and Restaurant Employees and Bartenders International Union AFL–CIO, Party to the Contract

Host Services, Inc. *and* Marlene Valihard *and* Local 20408, United Warehouse, Industrial and Affiliate Trades Employees Union. Cases 22–CA–9723, 22–CA–9898, 22–CA–10247, and 22–CA–10694

August 24, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On January 22, 1982, Administrative Law Judge Raymond P. Green issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief and counsel for Charging Party Union filed a brief in opposition to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order, as also modified herein.

The Administrative Law Judge determined that Respondent, on July 11, 1980, terminated employee Joseph Colwell in violation of Section 8(a)(3) of the Act. We do not agree. The record evidence reveals that Colwell participated in the 1980 union campaign by distributing leaflets and soliciting signatures for authorization cards from fellow employees. The existence of such activity by Colwell, along with the statement made by Supervisor Wallace cautioning him to "watch his step," leads us to agree with the Administrative Law Judge that counsel for the General Counsel has presented a *prima facie* case that Colwell's activity, which is protected under the Act, was a motivating factor in Respondent's decision to discharge him.[2] Although we find that the General Counsel has presented a *prima facie* case of unlawful motive, we note that it is a weak one.[3]

On the other hand, we are convinced that Respondent has met its burden of persuasion, i.e., that it has demonstrated that it would have discharged Colwell in the absence of the protected conduct.[4] Colwell's intemperate actions—cursing a supervisor on July 10, 1980, in the face of little or no discernible provocation—were, in our judgment, legitimate grounds—not a pretext—for the action taken by Respondent. The Administrative Law Judge attempted to pigeonhole the Colwell incident into past allegedly similar disciplinary occurrences. He concluded that employees who had engaged in misconduct similar to Colwell's, and were discharged, either had extensive disciplinary records, were employed for only a short period of time prior to their discharge, or were involved in misconduct of a more serious nature than Colwell's. The Administrative Law Judge found that those employees that did not fit into one of those three categories, including the Colwell incident, were either issued a warning or, at most, suspended. He thus reasoned that discharging rather than suspending Colwell constituted disparate treatment.

The categorizing of Respondent's past practices by the Administrative Law Judge is, we believe, overly simplistic. Generally, it appears that situations where employees engaged in conduct facially similar to Colwell's and were *not* discharged involved less serious, spontaneous exchanges. In contrast, Colwell's behavior was gradual in nature with ample time for a cooling-off period.

On July 10, Colwell had gone to check the flight boards in the corridor of the airport and had been followed by Supervisor Stewart. Colwell noticed this and, upon returning to his work area, he told another supervisor, Lewis, that if Supervisor Rossi or anyone else did not like his work he could kiss a portion of Colwell's anatomy. Supervisor Montesano then informed Colwell that Rossi did not want him to check the flight boards anymore.[5]

[1] In the absence of exceptions thereto, Chairman Van de Water adopts the Administrative Law Judge's findings that Respondent violated Sec. 8(a)(1) of the Act by interrogating employees. He does not, however, rely on *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980).

[2] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980).

[3] We note that, although Colwell supported the Union, he was not a particularly prominent supporter. Other more prominent supporters, of whom Respondent was well aware, were not discriminated against for their support. We also note that the Administrative Law Judge's findings concerning Respondent's knowledge of Colwell's activities and Respondent's animus toward the Union were somewhat tenuous. Finally, in assessing whether the General Counsel has demonstrated a *prima facie* case, and the degree proven, we are unable to rely on the alleged July 8, 1980, exchange between Colwell and Supervisor O'Hare. Colwell alleged that O'Hare inquired of him whether he had called the union attorney subsequent to an employee's asthmatic attack. O'Hare denied making the statement attributed to him. The Administrative Law Judge failed to resolve the credibility dispute.

However, even assuming the Administrative Law Judge had credited Colwell, we would find, for the reasons set forth below, that Respondent rebutted the General Counsel's case.

[4] *Id.*

[5] Colwell, a cook, checked the flight boards for delays so as to ascertain how much food to prepare.

Colwell then approached Supervisor Rossi about this admonition. When the meeting between the two was drawing to a mutually satisfactory conclusion, Colwell was asked by Supervisor Costanza about his earlier remark to Lewis. Thereafter, Colwell confronted Lewis, in the presence of Costanza and Rossi, and asked her if she had told Costanza about his (Colwell's) remark. When Lewis denied that she had done so,[6] Colwell became extremely enraged and verbally attacked Lewis with a vengeance. He was immediately instructed by Costanza to punch his timecard and, later that day, suspended indefintely. On July 11 he was discharged.

On the basis of the above facts and a review of Respondent's past practices, we are not persuaded that Colwell's behavior fits neatly into a category of misconduct that would normally have resulted in discipline less than discharge. The distinctions drawn by the Administrative Law Judge—in finding Colwell's misconduct would warrant, under Respondent's policy, no more than a suspension—are too narrow to be meaningful. Accordingly, Respondent's decision to discharge—rather than suspend—Colwell cannot be characterized as disparate treatment. Therefore, we will order dismissal of that portion of the complaint alleging that Respondent terminated Colwell in violation of Section 8(a)(3) of the Act.

AMENDED CONCLUSIONS OF LAW

The Administrative Law Judge's Conclusions of Law are modified by deleting paragraph 3.

AMENDED REMEDY

Having found that Respondent engaged in actions found to be in violation of the Act, we shall order that Respondent cease and desist therefrom and take certain affirmative action to effectuate the purposes of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Host Services, Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Delete paragraphs 1(a) and 2(a) and (b), relettering the succeeding paragraphs accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

[6] Essentially the truth, as it was Stewart who had related the remark to Costanza.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT threaten employees with discharge if they participate in a lawful economic strike, or because of their membership or support for Local 20408 or any other labor organization.

WE WILL NOT interrogate employees about their membership or sympathies for Local 20408 or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

HOST SERVICES, INC.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: These cases were heard before me in Newark, New Jersey, on July 20 through 23 and September 15 through 17, 1981.[1] During the hearing, certain of the allegations were settled by the parties by means of a partial informal

[1] The charge in Case 22-CA-9723 was filed by Dorothy Perdon on January 25, 1980. The charge in Case 22-CA-9898 was filed by Marlene Valihard on April 10, 1980. The charges in Cases 22-CA-10247 and 22-CA-10694 were filed by Local 20408, United Warehouse, Industrial and Affiliate Trade Employees Union on September 4, 1980, and March 11, 1981. The initial complaint in Cases 22-CA-9723 and 22-CA-9898 was issued by the Regional Director Region 22 on May 30, 1980. The first amended complaint in Cases 22-CA-9723, 22-CA-9898, and 22-CA-10247 was issued by the Regional Director on October 2, 1980. The second amended consolidated complaint in Cases 22-CA-9723, 22-CA-9898, 22-CA-10247, and 22-CA-10694 was issued by the Regional Director on April 29, 1981.

settlement agreement.[2] Accordingly, the remaining issues for resolution are the following:

(1) Whether on July 11, 1980, the Respondent discharged Joseph Colwell because of his membership and support of Local 20408, United Warehouse, Industrial and Affiliate Trade Employees Union (herein called Local 20408).

(2) Whether in October 1980 the Respondent by Thomas O'Hare and Michelle Hartsfield, respectively, interrogated its employees concerning their sympathies for Local 20408.

(3) Whether in October 1980 the Respondent by Thomas O'Hare threatened to discharge employees if they engaged in a lawful strike or a concerted refusal to work.

Based on the entire record in this proceeding, including my observation of the demeanor of the witnesses, and after considerations of the briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The parties agree that Host Services, Inc., is a Delaware corporation which operates restaurants and related facilities throughout the United States, including restaurants, and coffeeshops at Newark International Airport. It further is agreed that, annually, the Respondent derives gross revenues in excess of $500,000 and that it annually purchases products valued in excess of $50,000 which are delivered to its New Jersey facilities from States other than the State of New Jersey. Accordingly, it is concluded that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties agree and I find that both Unions involved herein are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Initially, in 1973, the Respondent recognized Locals 109 and 131 of the Hotel, Restaurant and Bartenders International Union, AFL–CIO, as the collective-bargaining representatives of its employees situated at Newark International Airport. In 1974 the International Union transferred jurisdiction from Locals 109 and 131 to Local 45 which was then recognized as the collective-bargaining representative notwithstanding the fact that the employees affected did not vote on the transfer.

In September 1975, the International merged Local 45 with two other locals to form a Local 69. The new Local 69 was thereupon recognized by the Company as the bargaining representative and, in that case too, the employees did not vote on the change. In December 1976, Host negotiated a collective-bargaining agreement with Local 69 covering the employees at Newark airport.

On September 30, 1979, Local 69 was merged into Local 6 of the same International Union and Local 6 was then recognized by the Respondent as the representative of its Newark airport employees. Here again, the affected employees did not vote on the merger. Notwithstanding this new merger, the collective-bargaining agreement with Local 69 was maintained in force and effect and Local 6 undertook to administer the terms of that contract.

In December 1979, the Company and Local 6 began to arrange for meetings to negotiate for a new contract to replace the one which was expiring on January 15, 1980. However, on December 31, 1979, the International Union directed that jurisdiction over Host's Newark employees be transferred back to Local 109 from Local 6. The Respondent then recognized Local 109 as the bargaining representative at Newark airport and negotiated a collective-bargaining agreement with that Local effective from January 15, 1980, to January 15, 1983. Needless to say, the employees of Host were not afforded advance notice of this last transfer of jurisdiction from Local 6 to Local 109 and they were not given an opportunity to discuss or vote on the transfer.

From January 1, 1980, until May 1980 the collective-bargaining agreement between Host and Local 109 was enforced, including the union-security and dues-checkoff provisions. However, in light of the unfair labor practice charge filed by Dorothy Perdon in Case 22–CA–9723 on January 25, 1980, the Company did not remit dues to the Union, but rather held them in escrow.[3] Thereafter, on October 17, 1980, these moneys were refunded to the employees.

In the meantime, on April 24, 1980, Local 20408 filed with Region 22 a petition for an election wherein it sought to gain representation on behalf of the Respondent's employees at Newark airport. On September 12, 1980, the Employer, Local 20408, and a recharted Local 69 executed a Stipulation for Certification Upon Consent Election pursuant to which a secret-ballot election was held on October 22, 1980. In that election, 84 votes were cast for Local 20408, 12 votes were cast for Local 69, and 61 votes were cast against both labor organizations. There were, in addition, three challenged ballots which did not affect the outcome of the election.

[2] As a result of the settlement agreement which was approved by me, pars. 9–15 and 22–25 of the second amended complaint were withdrawn. The settlement agreement contains a nonadmissions clause and also a clause whereby the General Counsel reserved the right to present evidence on the settled allegations to the extent such evidence would be relevant to the remaining allegations of the consolidated complaint.

By letter dated December 4, 1981, I was informed by the General Counsel that Respondent has fully complied with the terms of the partial settlement.

[3] At the same time Perdon filed the charge in Case 22–CA–9723, she also filed a charge against Local 109 in Case 22–CB–4269. This latter charge alleged that Local 109 attempted to cause the employer to discharge certain employees of Host because of their failure to authorize membership or dues deduction cards for that Union. It also was alleged that Local 109 violated the Act by accepting recognition as the bargaining representative of the Respondent's employees at Newark airport at a time when that labor organization did not represent a majority of such employees. The allegations of the CB charge were thereafter settled by Local 109 on May 30, 1980.

B. *The Discharge of Joseph Colwell*

The General Counsel contends that Colwell was discharged on July 11, 1980, because of his membership in and support for Local 20408. The Respondent denies this allegation and argues that Colwell's discharge was for just cause resulting from an incident which occurred on July 10. The Respondent further asserts that its managers and supervisors were not even aware, prior to July 10, that Colwell was a supporter of Local 20408.

Colwell was first hired on March 12, 1978, and was employed as a cook in Respondent's buffeteria located in Terminal B of Newark airport.[4] By all accounts Joseph Colwell was a good cook who did his job well and showed initiative in relation to his work. According to Thomas O'Hare, the Respondent's general manager, Colwell had done a lot of work to develop menus and to upgrade the quality of the food. O'Hare testified that he considered sending Colwell to a college or an apprenticeship program at the Company's expense in order to develop Colwell into a chef so as to be able to provide first rate dining facilities at the airport. In the same vein, Arkia Wallace, the Terminal B food and beverage supervisor, testified that Colwell was an excellent cook and a good employee. One of the things she cited in his favor was the fact that he checked the flight boards so that he could determine the amount of food he needed to cook and therefore he was responsible for reducing wastage.[5] As will be seen hereinafter, Colwell's practice of checking the flight boards, a practice which was praised by Wallace, takes on some significance as it became a local point around which many of the subsequent events turned. It is also noted that, during the period of Colwell's employment, he had received only one warning which was not, in any way, relied on by the Respondent in its decision to discharge him.

It appears from this record that the employee who first contacted Local 20408 and who was most active in its support was Dorothy Perdon who worked at Terminal A. Colwell first became involved with Local 20408 and the effort to oust the incumbent union in early May 1980 when he attended a meeting of Local 20408 after it had filed its representation petition on April 24, 1980. It was established that during May, June, and July Colwell actively supported Local 20408. Thus, the evidence discloses that Colwell along with Catherine Lattimore, and to a lesser extent, Leon Howard, engaged in a variety of activities at Terminal B including solicitation of membership and the distribution of leaflets and pamphlets at or about the facility.[6] At Terminal A, the employees who distributed literature were Dorothy Perdon, Marlene Valihard and Annette Jaworsky.

According to Colwell, various supervisors saw him distributing literature at Terminal B, including Arkia Wallace, Tyrone Anderson, Neil Rossi, and Paul Montesano, the latter being Colwell's immediate supervisor. Colwell states that, on one occasion in early May, Wallace saw him passing out literature and told the recipient not to read it. However, all of the above named people (except for Rossi who did not testify)[7] denied that they either saw Colwell distribute literature or solicit union membership. They denied categorically that they were aware of Colwell's union activities. Indeed, they went so far as to deny even being aware of Local 20408 until after Colwell's discharge. This latter assertion is, however, rather odd inasmuch as Local 20408's representation petition was served on the Respondent on or about April 25, 1980, and Darryl Costanza, Respondent's assistant general manager, concedes that he had instructed the supervisors, soon after the petition was filed, to look out for any unusual activity at the premises including union activity.

Sometime in May or June 1980, Colwell was involved in a conversation with Arkia Wallace.[8] In this regard, Colwell testified that Wallace approached him and Leon Howard and said that "they were trying to get rid of you, Leon and Cathy Lattimore." He states that, when he asked why, Wallace said that she did not know, but that he better watch his step. Catherine Lattimore testified that she was present during a portion of this conversation and recalls Wallace saying that "they were trying to get rid of you," and that "you better watch your step." Leon Howard, who worked directly with Colwell, did not testify.

Arkia Wallace acknowledges a conversation with Colwell and Howard in which she told Colwell that if he wanted to retain his job he should "straighten out" and "get his act together." She also testified that she told Colwell that she had heard that he was leaving his work station, whereupon Colwell responded that she knew he checked the flight boards. Wallace states that she told Colwell that she was aware of this but that she was not "there anymore," and that he should let them know when he was going. As to her intent during this conversation, Wallace asserted that she was not giving Colwell an official warning but was merely imparting some friendly advice. She also testified that she became aware of management's concern about Colwell and Howard

[4] The airport has three terminals, and the Respondent has restaurant and/or coffeeshop facilities at each. The terminals are designated as Terminal A, Terminal B, and the North Terminal.

[5] By checking the flight boards one can determine the number of delayed flights. When flights are delayed it is possible to anticipate more restaurant business because delayed passengers can reasonably be expected to spend their time in one of the Respondent's facilities.

[6] Catherine Lattimore and Leon Howard were both employed at Terminal B. Prior to Colwell's discharge three leaflets were distributed. One of these was an announcement of a Local 20408 meeting to be held on July 16, 1980. One was a pamphlet put out by the NLRB entitled "Your Government Conducts an Election." The third was a flyer entitled "Employees' Rights Under Federal Law." The latter two documents did not, on their face, indicate that they were sponsored by Local 20408.

[7] At the time of the hearing, Rossi, who was the manager of Terminal B, was no longer employed by the Respondent. The Respondent asserted that it made several unsuccessful attempts to contact Rossi by phone and telegram. However, it is conceded that the Respondent did not attempt to serve a subpoena, either by mail or in person, on Rossi at his last known address. Also, the Respondent did not offer into evidence a copy of the telegram it purportedly sent to Rossi and it offered no evidence to show that the telegram was delivered.

[8] It is not entirely clear as to when this conversation took place. Colwell's recollection was very confused and he could not be sure if it took place before or after he became involved with Local 20408. However, Catherine Lattimore, who testified that she was present during part of the conversation, placed it in late or early June. Arkia Wallace also placed the conversation as occurring in May or June.

leaving their work stations at a previous Wednesday management meeting.[9]

In relation to the above, I shall credit the testimony of Colwell and Lattimore to the effect that Arkia Wallace conveyed a warning to Colwell, Lattimore, and Howard sometime in late May or early June 1980. Indeed, based on Wallace's testimony this was not simply a warning, but constituted a threat of discharge. The real question, therefore, is whether the threat was motivated by a genuine concern regarding the employees leaving their work stations or whether it was related to their union activities. Based on all the circumstances including Wallace's own account of the transactions, it is my opinion that the threat was related to union activities.

Wallace testified that, a few days before her conversation with Colwell and Howard, their names were brought up at a Wednesday managers' meeting. She asserts that their names were mentioned in connection with an expressed concern by someone that they were leaving their work stations. There are, however, a number of points in her testimony which are intriguing. Firstly, in view of her admitted threat to Colwell, *et al.*, it may be inferred that at the Wednesday managers' meeting there was some discussion about discharging these employees, including Colwell who admittedly was highly regarded by management. Secondly, since Wallace, and no doubt the other managers, was aware that Colwell made a practice of checking the flight boards each day; as neither Colwell nor the others had received any prior warnings for leaving their stations; and as Wallace specifically approved of Colwell's practice, any suggestion that Colwell should or could be discharged on this account would make no sense. Indeed, as this entire transaction took place at a time when Colwell, Lattimore, and Howard were the employees primarily engaged in union activity at Terminal B, and as Wallace's explanation of the events leading up to the threat is implausible, it seems to me that what did take place at the managers' meeting was a discussion about the possibility of discharging these employees because of their union activities and their distribution of literature at the facility. Such distributions were considered by the Respondent as being contrary to its rules.[10]

Catherine Lattimore testified that on or about June 21, 1980, Costanza came over to where she worked, picked up and looked through a folder containing literature, and told her that she could not distribute such on the premises.[11] She states that Costanza told her to put the folder away and that she should get and put away the papers which Colwell also possessed. Costanza basically admits this conversation, although he was not asked and therefore did not testify about telling Lattimore to get Colwell's papers.

Colwell testified that in June 1980 he had another conversation with Wallace wherein she asked him what he had in common with Local 20408, and where she said that he had better watch himself. Wallace denied this conversation. In addition, Colwell testified that in June 1980, when he was distributing housewarming invitations to other employees, his supervisor, Paul Montesano, told him that Neil Rossi had expressed concern about Colwell passing out union literature, but that he (Montesano) had told Rossi they were only invitations to Colwell's housewarming party. Montesano denied this assertion, although conceding that he did tell Colwell that it was against company policy to pass out the invitations on company property.

On July 8, 1980, the ventilation fan in the area where Lattimore worked, broke down. It appears that, when Lattimore arrived at work and saw the condition at her work station (the grill), she asked O'Hare if she had to work there. When she and O'Hare went upstairs to check the condition, she had an asthma attack and was taken to a hospital. However, before she left, Colwell called her husband and also called Craig Livingston, the attorney for Local 20408. Livingston described Colwell's call as being excited and confused, whereupon after unsuccessfully trying to call the attorney for Host in California, he then called O'Hare, telling the latter that he had received a call from Colwell. According to Livingston, O'Hare explained that the problem had been taken care of and the matter was dropped. On July 9, 1980, according to Colwell, he and Leon Howard were asked by O'Hare and Shirley Lewis (another supervisor) which one of them had called the lawyer. Also Lattimore states that, on July 9, she was asked by Rossi who had called the lawyer and told him that it was Colwell. O'Hare denied having a phone conversation with Livingston on July 8, although he does assert that he did speak with him on July 9 about a doctor's release required from Lattimore. He specifically denies that Colwell's name was mentioned during his conversation with Livingston.

On the afternoon of July 10, a series of incidents occurred involving Joseph Colwell. It was this series of somewhat bizarre events which led to his discharge.

Colwell reported to work on July 10 at or about 2 p.m. and at or about 3 p.m., in accordance with his habit, he went out to check the flight boards. Costanza, seeing Colwell in the corridor, related this information to Neil Rossi and Donald Stewart, and asked if they were aware that Colwell was in the corridor. According to Costanza, they said no and Stewart was dispatched to look for Colwell. In this respect, Costanza testified that he was not concerned with Colwell being in the corridor but was only concerned about his supervisors knowing where their people were. Curiously, Stewart was not Colwell's immediate supervisor.

In any event, Colwell noticed that Stewart was following him and he became suspicious, a reaction which was understandable in view of the earlier warning by Wallace that he had better "watch his step." When Colwell returned to the buffeteria, he went over to where

[9] According to Thomas O'Hare, weekly management meetings were attended by himself, Darryl Costanza, Neil Rossi, Joyce Trachler, Dan D'Arcy, Joe Pontana, and Arkia Wallace.

[10] According to Darryl Costanza, his understanding of the Company's rules and the way he enforced them was that there could be no distributions and no solicitations anywhere on the Respondent's premises on company time.

It is noted that, subsequent to the testimony of Costanza, the Respondent agreed to settle that portion of the complaint wherein it was alleged that the Company unlawfully promulgated and enforced no-distribution and no-solicitation rules.

[11] The literature apparently was the NLRB booklet and the flyer entitled "Employees' Rights under Federal Law," described above at fn. 6.

Shirley Lewis and Don Stewart were sitting. Colwell told Lewis that he did not know what Rossi had against him and to tell Rossi that, if he (Rossi) or anyone else did not like his work, Rossi could "kiss my ass." Colwell then left that area and proceeded to see Rossi because Montesano told him that Rossi no longer wanted him to check the flight boards. At or about the same time, Stewart told Costanza what Colwell had said to Lewis and, when Costanza asked Lewis to confirm it, she did.

Colwell then had a conversation with Rossi in the office and was told that due to insurance considerations he should no longer check the flight boards. Colwell agreed. As the meeting between Rossi and Colwell was coming to a close, Costanza entered the office and asked Colwell if he told Shirley Lewis to tell him to kiss his ass. Colwell's immediate response was to ask, "Did you hear me say that?" When Costanza pressed the question, Colwell told him that he had directed the remark toward Rossi. In the meantime, Rossi left the office to look for Shirley Lewis and the interaction between Costanza and Colwell became hotter. It should be noted here that Costanza testified that he did not actually think that Colwell's original remark to Lewis was a big deal, but that he decided to tell Colwell to keep his opinions to himself.

When Costanza and Colwell left the office (near the bar area), Shirley Lewis and Neil Rossi approached. Colwell asked Lewis if she had told Costanza that he should kiss his ass and, when Lewis denied it, Colwell called her a damned liar. Soon thereafter, Costanza told Colwell to get his timecard and to punch out, which Colwell refused to do.[12] At this point it appears that the parties involved were in the noncustomer area of the facility called the back of the house. According to Colwell it was at this juncture that Costanza either said, "I know what a troublemaker or I know a union organizer when I see one."[13] This was denied by Costanza who for his part asserts that at this point Colwell "grabbed" Shirley Lewis, pulling her toward him, while yelling that she was a "damned liar" and a "mother fucking liar." Miss Lewis states that at this stage it was her opinion that Colwell was becoming irrational and that she pushed a knife that was lying on a table out of sight because she was frightened.[14] Costanza concedes that he too was becoming emotional.

According to Costanza, he then told Colwell that as far as he was concerned Colwell was indefinitely suspended. He further states that, after Colwell again called Lewis a "mother fucking liar," he told Colwell to leave or the port authority police would be called. According to Costanza he and Lewis went down the elevator toward O'Hare's office with Colwell yelling after them. Shirley Lewis states that, as she and Costanza got on the elevator, Colwell's final words were "if anything goes down, you're going down with it."[15]

The Respondent's witnesses assert that, soon after Shirley Lewis and Darryl Costanza went into O'Hare's office, Rossi entered and said that Colwell had just told him that he, Costanza, and Lewis were going to "burn." Colwell denies making such a statement and, as noted above, Rossi did not testify in this proceeding.[16] According to O'Hare, he, Costanza, and Rossi went back upstairs where he saw Colwell making a telephone call. O'Hare states that Colwell asked to speak with him, whereupon the entire group went back down to O'Hare's office. In the office, each person gave their respective versions of what had just happened. According to O'Hare, but denied by Colwell, the latter admitted to the "burn" statements. O'Hare also states that Colwell asserted that he felt he was being unfairly harassed and that, after the meeting ended, Colwell apologized for what had happened. After the various versions were presented to O'Hare, he told Colwell that he was suspended and to call him the following day for a final decision.

Soon after the meeting, Costanza wrote up a "Notice of Disciplinary Action" indicating that Colwell was indefinitely suspended because of insubordination and personal conduct. In describing the events upon which the suspension was based, Costanza wrote:

> Mr. Joe Caldwell [sic] on July 10, 1980 exhibited extremely gross insubordination toward supervisor Shirley Lewis. Mr. Caldwell in the presence of several management and non-management employees, in a very loud tone of voice which could be heard in the customer area called Ms. Lewis a "Damned Liar" and a "Mother Fuckin Liar." This is gross insubordination. Mr. Caldwell's actions are inexcusable and will not be tolerated. Mr. Caldwell is therefore indefinitely suspended.

According to O'Hare, he did not make a decision to discharge Colwell on July 10, but rather gave it careful consideration overnight. In his words, "it was one of the most difficult decisions I had to make regarding the termination of an employee." Nevertheless, O'Hare did decide to discharge Colwell and notified him of that decision on July 11.[17] According to O'Hare, whereas he

[12] According to Costanza, when he told Colwell to punch out, Colwell said, "You punch my mother fucking card."

[13] When asked about these alleged statements, Colwell at first testified that he was not sure if Costanza said troublemaker or union organizer. Later, he testified that Costanza used both terms. In his testimony at an unemployment hearing, Colwell, although relating the incidents on July 10, did not mention either remark allegedly made by Costanza, despite his assertion that his discharge was motivated by antiunion considerations.

[14] Miss Lewis testified that prior to this incident she had a good relationship with Colwell who always was polite in her presence.

[15] This last statement attested to by Shirley Lewis was not corroborated by Costanza who was in the elevator at the time. I assume that the Respondent would argue that this alleged statement by Colwell should be construed as a threat rather than a reference to the elevator.

[16] With respect to the alleged statement by Colwell to Rossi that he and the others would burn, the Respondent contends that I should rely on Rossi's testimony at the unemployment hearing. Fed. R. of Evid. 804(b) does permit, as an exception to the rule prohibiting hearsay evidence, the receipt of a person's former testimony when the declarant is unavailable. However, as noted above at fn. 7, I do not believe that the Respondent has made a sufficient showing that Rossi was not available to testify in this proceeding. Accordingly, I reject the Respondent's argument in this respect.

[17] On July 11, there was a short work stoppage by some of the Respondent's employees protesting the discharge of Colwell. This stoppage lasted only a few hours and all the employees involved returned to work on the same day.

considered Colwell to be a valued employee, he also testified that "what made me decide to terminate Colwell was essentially the question as to whether or not I would set a precedent to future actions and therefore I would not have control of our operations."

Colwell testified that, after his discharge, he had occasion to speak with Paul Montesano on the phone. According to Colwell, and denied by Montesano, the latter volunteered the opinion in September 1980 that Colwell was discharged because of his union activities. He states that, during this conversation, Montesano said that he knew that Colwell was an excellent worker and that "as far as he could see it, the only reason I was fired was because of my union activities." However, in a pretrial affidavit given by Colwell on July 23, 1980, he stated that on that date he spoke with Montesano about going to an unemployment hearing and that during that conversation he told Montesano that "the only reason they fired me was because of my union activities." Colwell, in the affidavit, stated that Montesano simply responded by saying that "I was right." At the unemployment hearing Colwell did not, however, bring up his alleged conversation with Montesano despite contending that he was discharged for his union activities.[18]

A group of documents relating to past discharges and disciplinary actions was placed into evidence. From these, the Respondent contends that its decision to discharge Colwell was consistent with prior dismissals of other employees for similar infractions. From the same group of documents, the General Counsel argues that they demonstrate that Colwell was treated in a disparate manner.

Notwithstanding the contention by the Respondent that cursing at a supervisor in the presence of others constitutes an automatic terminable offense, the evidence in this case does not tend to support such an absolute assertion.[19] Thus, there does appear to have been occasions where employees have engaged in conduct somewhat similar to Colwell's and have not been discharged. These may be summarized as follows:

1. Patricia Bennett received a 3-day suspension on February 13, 1980, for "being insubordinate in front of customers." She later was discharged on March 24, 1980, because she repeatedly refused to perform a job as per her supervisor's direction and used "insubordinate language." At the time of her discharge she had been employed for 7 months and had previously received one written warning for poor attitude toward customers, two 1-day suspensions for leaving her workplace unattended and sending customers away, and the aforementioned 3-day suspension.

2. Bill Conley, on October 17, 1979, was given a 1-day suspension for being abusive to his supervisor during a discussion and refusing to do as he was told. Previously, Conley was given a written warning for being involved in a "disruptive incident in the buffeteria" and exhibiting "rowdy behavior." Thereafter, on October 19, 1979, Conley was discharged after another incident in which he cursed at a supervisor and engaged in fighting on the job.

3. According to Catherine Lattimore, she witnessed an incident wherein an employee named Willie Thomas was asked by Supervisor Stewart to put on a hat and where Thomas told Stewart that he was not going to put on that "mother fucking hat." She also stated that Thomas threatened to assault Stewart during the incident. Lattimore testified that on that occasion Thomas received no discipline, although she does acknowledge that he was later discharged when a second incident of similar character occurred.

4. Lattimore testified about another incident where no discipline was given to employee Mary Foster who told a supervisor to keep "his damn hands off her card."

5. Dorothy Perdon testified that there was an incident wherein employee Marlene Valihard told a supervisor "to go to hell." She states that, at a meeting, D'Arcy (the manager of Terminal A) said that Valihard could be discharged for her remarks but decided to forgo any discipline as this was a first offense.

6. On one occasion, Annette Jaworski, when asked by D'Arcy what she was complaining about, responded by saying it was none of his "damn business." Jaworski received a 1-one day suspension for this.

7. Miren Jones received a final warning on August 4, 1978, because she called her supervisor a liar.

The records received in evidence show that a number of employees have been discharged for conduct which the Respondent asserts is arguably similar to Colwell's conduct on July 10, 1980. However, as will be seen below, most of these employees had extensive disciplinary records, or were employed for only a short time before their discharge, or were involved in conduct of a more serious nature. A summary of these records shows the following.

1. Steve Blevins was discharged on July 28, 1979, because he was insubordinate to a supervisor and called her names including "bitch." Earlier that day Blevins had received a 1-day suspension for wearing an improper uniform after having received a warning on that account on July 26, 1979. Previously, Mr. Blevins had received a 1-day suspension on April 5, 1979, for another infraction. Additionally, Blevins had been given five other written warnings. Blevins was employed for about 1 year prior to his discharge.

[18] In the briefs filed by the General Counsel and the Charging Party's counsel, neither relies on this alleged conversation between Colwell and Montesano. 1It is noted that the decision of the New Jersey Department of Labor's Appeals Tribunal was adverse to Colwell's claim for unemployment benefits. However, it also is noted that the testimony before that tribunal was far less extensive than was the testimony heard by me. I therefore do not think it appropriate to consider the decision of the state agency as binding on me or the Board. *Cadillac Marine & Boat Company*, 115 NLRB 1071 (1956); *H. M. Patterson & Son, Inc.*, 244 NLRB 489, 490 (1979).

[19] The Respondent maintains a progressive disciplinary system as follows:

> Any infraction of the company rules or regulations will be recorded by your supervisor on a warning notice form. The infraction will be explained fully and you will be asked to acknowledge it with your signature. All warning notices become part of your personnel record.
>
> Two such notices in your record can result in disciplinary action including suspension or discharge. In the event of a serious infraction of the company rules and regulations you may be discharged immediately, without prior warning notices.

2. Idriss Bradley was discharged on March 29, 1979, because he was not doing his work properly; he became irate when the supervisor refused to let him go home early and threatened to assault supervisors. Prior to his discharge, Bradley had been suspended for 5 days for refusing to do a job. He was employed 3 months prior to his discharge.[20]

3. Therese Falbo was discharged on July 15, 1981, because when her supervisor asked her several times to go to her work station Falbo said, "I don't like you anymore and you can go fuck yourself." Prior to her discharge, Falbo had received a suspension for being short in her cash register. Also, Falbo had received four written warnings for cash register errors. Falbo had been employed for about 4 months prior to her discharge.

4. Henry Freeman was discharged on January 27, 1979, because while being given a warning, Freeman said, "Jam this slip up your —." Prior to his discharge Freeman had been suspended for 4 days because of horseplay in the kitchen where food was thrown about and where an employee was injured. Also, Freeman had received four written warnings for a variety of infractions including rudeness to a customer. Freeman had been employed for about 9 months prior to his discharge.

5. William Gonzalez was discharged on January 30, 1980, because of insubordination, bad attitude, and having a foul mouth. Gonzalez had been employed for only 5 days and had not received any prior warnings.

6. Olivia Haynes was discharged on January 13, 1980, because she verbally abused and used profanity to supervisors in a public area. Previously, Haynes had received two written warnings respectively for absenteeism and a cash register shortage. She had been employed for about 3 months before her discharge.

7. Candice Holman was discharged on September 2, 1979, because of her use of extensive profanity in an argument with another employee in a public area. Previously, Holman had received one written warning for repeated lateness. She was employed for about 2 months before her discharge.

8. Wilber Galarza was discharged on May 1, 1980, because he refused to follow orders coupled with loud statements to his supervisor to "shut the fuck up." Galarza had received no prior warnings or disciplinary action, but was employed for only 2 months prior to his discharge.

9. Charles Ross was discharged on August 4, 1979, because he left the floor when asked not to, and responded with foul language toward the Company and the supervisor. Previously, Ross had received a written warning for poor work performance. Ross was employed for about 1 month before he was discharged.

10. Gerald Simpkins was discharged on March 2, 1979, because he refused to do work as ordered by his supervisor and for "shouting out insults" to the supervisor. Previously he had received a warning for failing to give proper notice before taking time off. Simpkins was employed for about 1-1/2 months prior to his discharge and the Company's records state: "This employee has a very bad language problem. He does his work only when we go thru the third degree with him."

11. Willie Thomas was discharged on February 13, 1981, because he refused to comply with a supervisor's orders and threatened to fight with the supervisor. Willie Thomas had been employed for about 4 months prior to his discharge and had not received any prior warnings. However, as noted above, Catherine Lattimore testified that she was present at an earlier and similar altercation between Thomas and his supervisor, Don Stewart, wherein no disciplinary action was taken.

12. Earl Williams was discharged on July 14, 1979, because, when he was asked to leave an area, "his attitude was insubordinate both verbally and by his actions." Williams had previously received two written warnings for absenteeism and tardiness. Williams had been employed for about 3 months prior to his discharge.

13. Andrew Brown was discharged on October 15, 1979, because he "provoked a loud and boisterous discussion with a fellow employee," and continued to tease and abuse the employee in a public area despite being aware of his personal problem. Previously Brown had received two suspensions, one for absenteeism and one for deliberately disobeying a supervisor. Additionally, Brown had received four other warnings. Brown had been employed for about 10 months.

14. Ronald Coleman was discharged on July 8, 1979, because he was rude to a customer. Previously, Coleman had been suspended for 3 days for refusing to follow orders. Also he had received five warnings for a variety of infractions. Coleman had been employed for about 8-1/2 months prior to his discharge.

15. Jeff Coward was discharged on November 14, 1978, because he challenged his supervisor to a fight. The discharge notice went on to state: "This is not the first time that you have threatened Host Management." Previously, Coward had received a 3-day suspension and two written warnings for unrelated offenses. Coward was employed for about 6 months prior to his discharge.

16. Ernest Mitchell was discharged on February 15, 1980, because he threatened to assault his supervisor. Previously, Mitchell had received a 1-day suspension for latenesses and two other warnings for lateness.

17. William Royal was discharged on July 7, 1980, for threatening a supervisor with bodily harm. Previously, he had received two written warnings for absences. He had been employed for about 4-1/2 months prior to his discharge.

18. Eric Atkins was discharged on September 23, 1980, because he refused to perform an assigned task and walked off the job. Previously, he had received one written warning for excessive tardiness. Atkins was employed for about 2 months prior to his discharge.

19. Michael Blow was discharged on May 8, 1980, because of insubordination and his refusal to follow the Company's dress code. Previously, on August 19, 1979, Blow was suspended for 3 days for being sarcastic to customers. Blow had been employed for about 5 years prior to his discharge.

20. John Carter was discharged on August 11, 1980, because of horseplay and wrestling with a coworker

[20] The records also show a group of written warnings to one Idriss Fuller. On the basis of this record I do not know for certain that Idriss Fuller and Idriss Bradley are the same person.

after receiving a verbal warning about this earlier in the day. Prior to his discharge Carter had been employed by the Company for about 1-1/2 months.

21. Gil Colon was discharged on July 22, 1979, because he refused to perform a job assignment and told his supervisor to fire him if she chose to. Colon had received no prior warnings, but had been employed for less than 2 months.

22. John Correano was discharged on October 26, 1978, because he broke the timeclock when he hit it with his fist. He had received no prior warnings and had been employed for about 4 months.

23. Leon Howard was discharged on July 10, 1980, because he refused to perform Joseph Colwell's job when Colwell was terminated. He had been employed almost 2 years and had received no prior warnings.[21]

24. Kevin Leak was discharged on June 3, 1979, for refusing to do an assigned job. He had been employed for about 1 month.

25. Mark Lewis was discharged on June 1980 because he refused to comply with the Company's grooming standards. Lewis had previously received verbal warnings and two 1-day suspensions, one of which related to his failure to shave and the other to his refusal to perform work. Lewis had been employed for about 9 months prior to his discharge.

26. Vincent Niney was discharged on February 12, 1979, for assaulting his supervisor. He had been employed for 5 days.

27. Theresa Ragonese was discharged on October 5, 1978, because she refused to work at her assigned work station and told her supervisor, "You can fire me." She had worked for 1 month and had received no prior warnings.

28. Ken Williams was discharged on April 12, 1981, because he refused to follow a supervisor's orders, had a bad attitude, and was unprepared for work. Previously he had received three written warnings for absenteeism and tardiness. Williams had been employed for about 10 months.

C. *Concluded Findings as to Colwell's Discharge*

Although Colwell's performance as a cook may have been exemplary, the same cannot be said for his performance as a witness. In my opinion he often was confused both as to dates and the sequence of events and his testimony at times struck me as being excessively vague and contradictory. Moreover, on certain points his testimony was at variance either with his pretrial affidavit or with his testimony given at an unemployment hearing. Therefore, in reaching my conclusions in this case I shall discount certain aspects of Colwell's testimony which were unpersuasive to me. Accordingly, I shall not credit Colwell's assertion that on July 10, 1980, Costanza said, "I know a Union organizer or a troublemaker when I see one." Similarly, I shall not rely on Colwell's assertion that sometime in late March or early May he overheard Rossi telling other supervisors that, if certain employees did not cut out their activities, heads would start rolling. Also, I do not find that, subsequent to Colwell's discharge, Paul Montesano offered his opinion that Colwell was fired because of his union activities.

At the same time, certain elements of Colwell's testimony, about which I was skeptical upon first hearing, turned out to be essentially corroborated by certain of the Respondent's witnesses. Thus, Arkia Wallace conceded that in May or June she did transmit a threat of discharge to Colwell. Moreover, my opinion, as I have indicated above, is that this threat was in fact related to Colwell's union activities and not to his approved practice of leaving his work station which he did in order to check the flight boards.

It is also clear to me that, given the fact that Local 20408 had filed its petition for an election on April 24, 1980, and the testimony of Costanza that he instructed his supervisors to look out for any unusual activity including union activity, the Respondent's supervisors were aware of this Union, despite their assertions to the contrary. I therefore find the denials of such knowledge by Supervisors Montesano, Wallace, and Anderson to be incredible. Moreover, because Lattimore, Colwell, and Howard were the employees who were principally responsible for distributing literature and soliciting union membership at Terminal B, and given Costanza's acknowledgement that he was aware of Lattimore's activity, it seems implausible that the Respondent's management was not equally aware of Colwell's activities.

There is no doubt that the events of July 10 precipitated Colwell's discharge. In this regard it is apparent that, when Costanza sent Supervisor Stewart to check on Colwell's movements, Colwell, who was checking the flight boards, as per his usual practice, became justifiably upset. Thus, the trigger of all the subsequent events on July 10 was caused by Costanza, who admittedly was not even concerned about Colwell being in the corridor, but was only concerned about whether his supervisors knew where their people were.

It is acknowledged by Colwell that, when he returned to the buffeteria, he told Shirley Lewis that Rossi or anyone else who did not like his work could "kiss his ass." This statement in turn was conveyed to Costanza who entered a meeting between Rossi and Colwell for the purpose of confronting the latter, even though Costanza did not think that the statement itself was a "big deal." It also is evident that, when Costanza questioned Colwell about his statement, Colwell initially attempted to deflect Costanza's question by asking Costanza if he heard it. From this point, the confrontation became increasingly heated and when Rossi and Lewis met Colwell outside the office, the latter accused Lewis of being a "damn liar." I also believe, based on Lewis' testimony, that Colwell did in fact call her a "mother fucking liar," but that this occurred in the back of the house, in a nonpublic area. As to the contention that Colwell grabbed Lewis, the testimony as a whole does not suggest that Colwell assaulted her, but merely took her arm as a means of getting her attention. It also is clear that, during the argument, Costanza told Colwell to punch out and to leave the premises which Colwell refused to do. Insofar as the assertion by the Respondent that Col-

[21] The General Counsel did not allege Howard's discharge as being discriminatory.

well made the statement to Rossi that he, Costanza, and Lewis would burn, there is in my opinion insufficient evidence in this record to support that assertion which was denied by Colwell. Moreover, it is noted that on the form filled out by Costanza on July 10, which sets forth the reasons for Colwell's indefinite suspension, no mention was made of this alleged threat or of any physical assault on Lewis.

O'Hare characterized his decision to discharge Colwell as being one of the most difficult decisions he had to make. He also conceded that before he made the decision he was aware that Colwell had been followed in the corridor while checking the flight boards and that Colwell had expressed his belief that he was being harassed. There is also no question but that among the reasons for O'Hare's difficulty in reaching the decision was the fact that O'Hare considered Colwell to be an excellent employee who had great potential value to the Respondent's operations at the airport.

I do not believe that, when Costanza sent Stewart out to follow Colwell, he anticipated the chain of events that was to follow. Thus, I think it highly improbable that, when Costanza made that decision, he intended to provoke an incident which would give him grounds to discharge Colwell. At the same time, given the entire set of circumstances, it may fairly be asked whether Respondent's knowledge of Colwell's union activities was placed in the balance when O'Hare made his "difficult" decision to discharge him.

As in all cases of this nature, the ultimate question is one of intent. Moreover, in the absence of an admission, the question of intent cannot be directly ascertained, and its manifestation by words and deeds must be divined. Among the factors to be considered is whether, in this instance, the Respondent acted in accordance with or at variance from its past practice. *Wright line, a Division of Wright, Inc.*, 251 NLRB 1083 (1980); *Gossen Company, a Division of the United States Gypsum Company*, 254 NLRB 339 (1981).

The Respondent asserts that, when an employee curses at a supervisor in the presence of others, this, by itself, constitutes an automatic ground for dismissal, irrespective of the employee's past record. However, in making that assertion, it seems to me that the Respondent asserts more than the evidence can bear. Thus, although it is true that there have been instances where employees have been discharged for cursing at supervisors, those instances involved factual situations which are distinguishable from Colwell's. Thus, for the most part, where employees have been discharged for cursing at supervisors, the employees involved have either had extensive past disciplinary records or have been employed for short periods of time. Also, in a number of instances the discharges were not based solely on cursing, but involved situations where that was coupled with unambiguous acts of insubordination or with threats of physical assault. By the same token, the evidence herein shows that there have been occasions where either no discipline or discipline short of discharge was imposed on employees who cursed at supervisors in the presence of others. Indeed, Costanza conceded that, when Colwell told Lewis to tell Rossi to "kiss his ass," he did not consider that statement to be a "big deal."

It is not my intention to decide what I would have done were I in O'Hare's place when the events of July 10 were reported to him. Rather, my analysis goes to the question of what he would have done based on the Company's past practice in similar circumstances. While recognizing that no set of events is precisely the same as previous circumstances and that no company can be expected to follow past practice by use of a precise mathematical formula, it nevertheless is my opinion that the conduct of Colwell on July 10 (which itself was precipitated by Costanza's actions) would not have resulted in a discharge based on the Company's historical precedent. On the contrary, it is my opinion that had these events occurred at a different time O'Hare would either have approved a written warning or a suspension of 1 to 3 days. Put another way, it is my conclusion that but for the Company's awareness and concern over Colwell's union activities he would not have been discharged. It therefore is concluded that the Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Colwell on July 11, 1980.

D. *Other Alleged 8(a)(1) Conduct*

According to Dorothy Perdon, on or about October 6, Supervisor Michelle Hartsfield came over to a group of employees and asked how she really felt about the Union. Perdon testified that she asked Hartsfield what she was talking about and said, "Why do you think we need a union?" According to Perdon, Hartsfield responded by saying that the employees ought to give the Company a chance. Perdon states that she and the other employees, all of whom openly supported the Union, explained their reasons for wanting representation by Local 20408, whereupon Hartsfield said, "Well I can see what everyone's feelings are." This conversation was essentially corroborated by Dorothy Morton. Hartsfield, who no longer was employed by the Company at the time of the hearing, did not testify.[22]

In connection with the above, while the interrogation by Hartsfield can hardly be described as momentous, it nevertheless constitutes a violation of the Act. Thus, in *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980), the Board reversed the Decision of an Administrative Law Judge, who, relying on *Stumpf Motor Company, Inc.*, 208 NLRB 431 (1974), and *B. F. Goodrich Footwear Company*, 201 NLRB 353 (1973), had concluded that interrogation of a similar character did not violate the Act. In *PPG Industries* the Board stated:

> The Administrative Law Judge found the inquiries to Hepler, Lanning, and Potts to be privileged under *Stumpf* and *B. F. Goodrich*. Those cases found questions concerning employees' union sympathies to be not coercive in view of the employees' open

[22] Respondent asserted that it attempted to contact Hartsfield by phone and letter but was unsuccessful. However, as in the case of Rossi, Hartsfield was not subpoenaed and it was not shown to my satisfaction that she was unavailable.

and active support for the union and the absence of other threats in the conversations. We have recently held, however, that inquiries of this nature constitute probing into employees' union sentiments which, even when addressed to employees who have openly declared their union adherence, reasonably tend to coerce employees in the exercise of their Section 7 rights. We have further found such probing to be coercive even in the absence of threats of reprisals or promises of benefits. The type of questioning at issue conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future. The coercive impact of these questions is not diminished by the employees' open union support or by the absence of attendant threats. Accordingly, we hereby overrule *Stumpf and B. F. Goodrich* to the extent they hold that an employer may lawfully initiate questioning about employees' union sentiments where the employees are open and known union supporters and the inquiries are unaccompanied by threats or promises. We find that Respondent violated Section 8(a)(1) of the Act by questioning union adherents Hepler, Lanning, and Potts about their union sympathies and reasons for supporting the Union. [251 NLRB at 1147.]

The other alleged 8(a)(1) violation is based on a conversation between Catherine Lattimore and Thomas O'Hare, occurring in October 1980. Lattimore testified that O'Hare asked a group of employees including herself if they had received a letter from the Company explaining its position *vis-a-vis* the two competing Unions. She states she told O'Hare that she did not like the letter because it was trying to tell the employees that they did not need a union. She further states that O'Hare then asked why they thought they needed a union, to which she responded that a union was needed to prevent supervisory harassment. Lattimore asserts that O'Hare said that unions only cause problems between management and employees and that they could have a better relationship if the employees voted against both Unions. According to Lattimore, O'Hare also said that unions were known for going out on strikes and that if the employees participated in an illegal strike they could be fired. She states that O'Hare characterized a strike for more money and benefits as an illegal strike. As to this alleged conversation, O'Hare was not asked to give his version and therefore Lattimore's testimony stands unrebutted. I therefore shall conclude that on this occcasion O'Hare made statements in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Host Services, Inc., is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions involved herein are labor organizations within the meaning of Section 2(5) of the Act.

3. By discharging Joseph Colwell on July 11, 1980, because of his membership and activities on behalf of Local 20408, the Respondent violated Section 8(a)(1) and (3) of the Act.

4. By interrogating employees about their union sympathies, the Respondent violated Section 8(a)(1) of the Act.

5. By telling employees that they would be fired if they engaged in an economic strike, the Respondent violated Section 8(a)(1) of the Act.

THE REMEDY

Having found that the Respondent unlawfully discharged its employee, Joseph Colwell, and engaged in other actions found to be in violation of the Act, I shall recommend that the Respondent cease and desist therefrom and take certain affirmative action to effectuate the purposes of the Act.

With respect to Joseph Colwell, it is recommended that the Respondent offer him full and immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and to make him whole for any loss of earnings he may have suffered by reason of the discrimination practiced against him, such earnings to be computed in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and upon the entire record herein, and pursuant to Section 10(c) of the Act, I hereby recommend the issuance of the following recommended:

ORDER[23]

The Respondent, Host Services Inc., Newark, New Jersey, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging employees because of their membership or activities on behalf of Local 20408 or any other labor organization.

(b) Threatening employees with discharge if they participate in a lawful economic strike, or because of their membership or support for Local 20408 or any other labor organization.

(c) Interrogating employees about their membership or sympathies for Local 20408 or any other labor organization.

(d) In any like or related manner interfering with, restraining, or coercing our employees in the exercise of their Section 7 rights.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Joseph Colwell full and immediate reinstatement to his former position of employment or, if that po-

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

sition no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its places of business at Newark International Airport copies of the attached notice marked "Appendix."[24] Copies of the said notice, on forms provided by the Regional Director for Region 22, after being duly signed by Respondent's representative, shall be posted by it in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 22, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."